

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1029 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

And

MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

MAULANA ABULKALAM AEENUL HAQUE SHEIKH

Versus

STATE OF GUJARAT

Appearance:

MR JM BUDDHBHATTI for Appellant
MR BD DESAI, APP for Respondent

CORAM : MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

Date of decision: 18/01/2000

ORAL JUDGEMENT : [Per: H.R. Shelat, J.]

1. Being aggrieved by the judgment and order dated 1st September, 1993, passed by the then learned Addl. City Sessions Judge at Ahmedabad in Session Case No.353 of 1992 on his file, convicting the appellant of the offences punishable under Sections 376, 366 and 363 of the Indian Penal Code and sentencing him for rigorous imprisonment for 10 years and fine of Rs. 5000/- and in default of payment of fine rigorous imprisonment for two years more, qua the offence u/s 376 I.P. Code; rigorous imprisonment for 5 years and fine of Rs. 2,500/- or in default rigorous imprisonment for one year more, qua the offence u/s 366 I.P. Code; and rigorous imprisonment for 3 years and fine of Rs. 1,000/- or in default rigorous imprisonment for six months more, qua the offence u/s 363 I.P. Code; the appellant (original accused) has preferred this Appeal challenging the legality and validity of the conviction and sentence inflicted.

2. Necessary facts may in brief be stated. Ramjanibhai Ibrahimbhai Badiwala is serving as Peon in Homeopathy College at Anand. He is residing with his family members in Tad-ni-sheri in Jamalpur area of Ahmedabad. He has four daughters, namely, Noorjahan, aged about 15 years, Rehana, aged about 14 years, Zareena the victim, aged about 11 years 9 months, and Shaheena, aged about 7 years. Zareena was going to a school for learning Arabi language. The accused was being the maulana in the School, teaching Arabi language. In that school boys and girls were studying together. Because of the co-education, Ramjanibhai Ibrahimbhai Badiwala did not think it wise to continue the study of Zareena in the said school. About six months prior to the date of incident, Zareena was taken off the school. The appellant then approached Ramjanibhai and persuaded for his tuition at home saying that he would be taking necessary care to teach Arabi language at his residence to Zareena so that she might not be deprived of her education always helpful in life and she will not have to repent in future regarding her having been taken off the school. The tuition fee was then fixed at Rs. 20/-. The accused was then regularly going to the house of Ramjanibhai for imparting tuition in Arabi language to Zareena. On 19th May, 1992, as usual, Ramjanibhai had gone to Anand for discharging his duties as Peon. In the evening around 7.30 p.m. he came back. Noorjahan, his daughter informed that the accused had taken away Zareena under the pretext that he would be coming back taking a round in the city. Both had gone by the luna of the accused. At that time, the mother of Zareena had gone to the market for purchasing vegetables. Rehana, younger to

Noorjahan, was at home. The search was then made but no where from the known places Zareena could be traced out. On 23rd May, 1992, at last, a complaint was lodged with Gaekwad Haveli Police Station for the above said offences. The investigation was taken on hand and after about 20 days, Zareena and the appellant could be traced out from Delhi. The police then came to know that on 19th May, 1992, in the evening at 5.00 p.m. when the mother of Zareena had gone to the market to purchase vegetables, the appellant took away Zareena from lawful keeping of Ramjanibhai Ibrahimhai, without his consent under the pretext that he would take a round in the city on luna and would come back. Under that pretext, after leaving the house of Ramjanibhai, he took Zareena to the house of Mohamad Idris, where from hiring a taxi, appellant, Zareena, Mohamad Idris and his wife went to Abu. After reaching Abu at 8.30 p.m. they could see that the luxury bus going to Jaipur was ready. They boarded the bus and went to Jaipur. After reaching Jaipur on the next day in the morning at 7.00 a.m. they also found that another luxury bus going to Delhi was ready. They boarded the same bus and reached Delhi on 20th May, 1992 at 1.30 p.m. All of them went to Patelnagar, where brother of the appellant was residing. Mohamad Idris had to discharge a religious vow he had taken and, therefore, he had gone to Delhi and after that ceremony was over, he came back to Ahmedabad on 3rd June, 1992. The accused remained at Delhi. He then seduced and forced Zareena to illicit intercourse and succeeded in having the sexual intercourse with her. He thus, without the consent and desire of Zareena, committed rape. The police thus could see that with the intention to force or seduce to illicit intercourse, appellant kidnapped Zareena and committed the above said offences. A charge sheet for the said offences then came to be lodged in the court of the Metropolitan Magistrate at Ahmedabad. The Magistrate being incompetent to hear and decide the case, committed the same to the City Sessions Court at Ahmedabad, which came to be registered as Session Case No. 353 of 1992. The same was assigned to the then Addl. City Sessions Judge, who framed the charge Exh.2 against the appellant, to which, appellant pleaded not guilty. The prosecution then led necessary evidences. Appreciating the evidence before him, the then learned Addl. City Sessions Judge, reached the conclusion that the prosecution had succeeded in establishing the charge beyond reasonable doubt. He, therefore, held the appellant guilty and sentenced him aforesaid. It is against that order of conviction, the present appeal is filed.

3. Mr. J.M. Buddhbhatti, learned Advocate readily agreed to our proposal and rendered legal assistance to the appellant. He assailed the judgment and order of conviction contending that the evidence on record was not worthy of credence because of several contradictions. Zareena on different points, viz. the tuition being imparted in the school, the conduct of the appellant in the school after the school hours and also about happening of unspeakable and untellable incidents, indecent conduct and abscene behaviour of appellant violating her person during 20 etc. days stay at Delhi did not specifically state before the Police, but stated before the Court when she was examined. Likewise, Ramjanibhai also stated the facts before the court which he did not state before the police during the course of investigation. As there was the improvements in the story, no reliance on such fishy evidence ought to have been placed. We do not think it necessary to specifically refer to all those contradictions because those contradictions carry no weight in view of the defence taken by the appellant.

4. The appellant before the trial court came out with the case in his defence that he was no doubt teaching Arabi language in the school and after Zareena was taken off the school, he continued to teach Arabi language at her residence but he did no wrong. With the consent of Ramjanibhai and her wife, nikah ceremony was performed on 1st March, 1992 in the presence of Mohamad Idris, parents of Zareena and many others. Since that day Zareena had become his legally wedded wife. In connection with tailoring work, he had to go to Delhi. Zareena knowing about the same expressed her desire to accompany him. He, therefore, took Zareena to Delhi with the consent of her father and mother. Both then stayed at Delhi at his brother's place from where he was arrested by the police during the course of investigation after the complaint was lodged against him. Formerly, about one and half years back he, Zareena and her sisters had gone on tour to different places. The maternal uncle of Zareena was against the marriage. He planned out a false case and got the FIR lodged. He has thus come out with the case that he did not kidnap Zareena but Zareena of her own accord had gone with him to Delhi and with her consent and willingness both stayed at Delhi.

5. In view of such defence, where major part of the prosecution story is admitted, minor contradictions pointed out by Mr. Buddhbhatti lose the value. He at this stage fairly concedes that those contradictions are of no consequence.

6. Mr. Buddhbhatti submits to accept the case in defence and hold that the charge is not legally proved. The evidence led by the prosecution is scanty and insufficient. It suffers from inherent improbabilities and points to concoction. Zareena was the legally wedded wife. There was no wrong if both went to Delhi and simply stayed together. It is the case of the prosecution that no nikah was performed but to screen himself from the liability, the appellant had come out with the case of performance of nikah. The evidence on record was sufficient and cogent and was pointing to the guilt of the appellant.

7. The party who asserts a particular fact and urges the court to believe his assertion, it is his duty to prove that fact leading necessary evidence or he may prove the fact from the evidence already led by the opposite party. It is pertinent to note that in the case on hand, no evidence, whatsoever, has been led by the appellant to prove the fact of nikah he also asserted and wants the court to accept the same. One of the invitees present at the time of nikah is also not examined. Mohamad Idris who is the friend of appellant, and who had accompanied him upto Delhi was according to the appellant present at the time of nikah. No doubt, he is examined at Exh. 7, but he does not support the fact of nikah. When available evidence is withheld and one who is examined is silent on the point the case about performance of nikah cannot be accepted. When father of victim Zareena was being examined, no question in this regard was put to him. The party asserting a particular fact and desiring the court to accept the said fact has also to put his case in the cross-examination of the witnesses of the opposite party and if no suggestion in the cross examination is made putting necessary question to the concerned witnesses, the case asserted by the other side cannot be accepted. In the present case, when father of Zareena was deposing, no question regarding performance of nikah is put to him and conveniently the appellant has remained silent though he was knowing well that the prosecution was disputing the said fact. When that is so the case about performance of Nikah cannot be accepted. In view of such facts, there is a reason to accept the contention of the prosecution that the case about performance of nikah advanced in defence was subsequently made out by the appellant, so as to screen himself from the liability.

8. Zareena has in her evidence (Exh.8) made it clear how the appellant took her to Delhi and violated her

person forcing her to have sexual intercourse with him making her helpless by coercion, or ruse, or deception, or beguilement. She having been made helpless had to surrender. The appellant thus took disadvantage of her helpless - resignation, not for a day or two but continuously for 20 days, the period of their stay at Delhi. It follows that after going to Delhi the appellant threw off his mask and deflowered of Zareena. The say of Zareena that she was ravished is also supported by the evidence of the doctor who examined her after she was brought back to Ahmedabad.

9. The learned advocate for the appellant therefore contends that there was consent on the part of the victim because she did not resist or object to alleged ravishment and molestation. Further it appears that she did not lodge a complaint with any of the police stations in Delhi or narrated her woes and miseries to anyone seeking necessary helps. It appears from the evidence that she was not permitted to move out and was either kept under constant surveillance or was confined. It was difficult for her to go out and seek help. But, assuming for a while that she was a consenting party as contended, the appellant cannot escape of his liability or the consequences of the wrong done by him.

10. At this stage, it is necessary to have a look at Section 375 of the Indian Penal Code which defines "Rape". Shortly stated, if a person has sexual intercourse with a woman against her will and without her consent is said to commit rape. If the girl is under 16 years of age, the consent or no consent of the girl is immaterial, and even if there is a consent, it is no consent in the eye of law. Hence, if the person has a sexual intercourse with a girl below 16 years of age with her consent, even then he can be said to have committed the offence of rape.

11. In view of such law, the age of Zareena assumes importance. Her father has made it clear that Zareena was born on 19th August, 1980 and in support of his say, he has also produced the copy of her birth certificate (Exh.7) issued by the Ahmedabad Municipal Corporation. It also shows that Zareena was born on 19th August, 1980. On the date of incident, therefore, she was 11 years and 9 months old i.e. below 16 years of age. Hence, even if it is believed that Zareena consented to have sexual intercourse, the offence of rape can be said to have been committed because she was at that time under 16 years age. The learned Addl. City Sessions Judge was

therefore perfectly right in holding that the charge of the offence punishable under Sections 366 and 376 of the Indian Penal Code was established beyond reasonable doubt.

12. True that the prosecution has not examined Noorjahan; but that omission is not fatal to the prosecution. Rehana, who was also present in the house when appellant took away Zareena is examined at Exh.16. In law quality counts and not quantity. The prosecution has to decide who should be examined to unfold the story. If there are more than one witnesses knowing the same fact, it is open to the prosecution to select one of such witnesses and drop to examine rest of the witnesses. In that case it will not amount to unfairness on the part of prosecution or it cannot be said that the prosecution has suppressed the true fact so as to put the court to a wrong track. When out of 2 witnesses knowing the same fact the prosecution has selected to examine Rehana, no fault can be found with the prosecution and it cannot be said as contended by Mr. Buddbbhatti, the learned Advocate for the appellant that non-examination of Noorjahan speaks volumes against the prosecution and the same makes the case of the prosecution infirm and far from truth.

13. We have with meticulous care and finicky details perused the evidence on record. It is neither scanty nor infirm as contended. The same is sufficient to hold that the prosecution has succeeded in establishing the charge.

14. Mr. Buddhbhatti, learned advocate for the appellant submits that the learned Addl. City Sessions Judge was not right in convicting the appellant relating to the offence punishable under Section 363 of the Indian Penal Code. In reply Mr.B.D.Desai, learned APP submits that the offence under Sec.363 being an independent offence, there was no wrong on the part of the lower court in inflicting the sentence in that regard. The contention of Mr. Buddhbhatti cannot be brushed aside lightly.

15. In our view, if the accused is being convicted for the graver offence wherein lighter offence merges, on the charge being proved, the accused cannot be convicted for the lesser offence which is already merged with the graver offence. The offence under Sec. 366 of the Indian Penal Code is a graver offence than the one under

Section 363 of the Indian Penal Code. The accused, therefore, cannot be convicted at the same time of the minor offence under Section 363 when he is being convicted and sentenced of the offence under Section 366 which is the graver offence. The learned Addl. City Sessions Judge was, in view of the settled legal position, was not right in inflicting the sentence separately for the offence under Section 363 of the Indian Penal Code. The sentence inflicted in connection with Section 363 of the Indian Penal Code is therefore, required to be quashed and set aside and for this limited purpose, the Appeal is required to be partly allowed.

16. While parting, we may state that we generally agree with the learned Addl. City Sessions Judge, except on the sentence regarding the offence under Section 363 of the IPC. It is, therefore, not necessary for us to restate all those reasons to deal with different aspects of the case.

17. For the reasons stated hereinabove the Appeal is partly allowed. The judgment and order convicting and sentencing the appellant as aforesaid qua the offences punishable under Section 363 of the Indian Penal Code is hereby quashed and set aside and the appellant is acquitted of the same, but, conviction and sentence qua the offences punishable under Sections 366 and 376 of the Indian Penal Code are maintained.

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